9

No. 357

Office - Supreme Court
FILED
NOV 9 195
HAROLD B. WILLEY,

IN THE

# Supreme Court of the United States

OCTOBER TERM, 1953.

JOHN LOUIS VASZORICH,
*Petitioner,*

*vs.*

THE STATE OF NEW JERSEY,
*Respondent.*

*ON PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF NEW JERSEY.*

## BRIEF FOR RESPONDENT IN OPPOSITION.

J. VICTOR CARTON,
Monmouth County Prosecutor,
State of New Jersey,

GEORGE A. GRAY,
Assistant Prosecutor of Monmouth County,
*On the Brief,*
Monmouth County Court House,
Freehold, New Jersey,

AND

J. FRANK WEIGAND,
36 West Front Street,
Keyport, New Jersey,
*Counsel for Respondent.*

October 26, 1953.

Arthur W. Cross, Inc., Law Printers, 71-73 Clinton Street, Newark 5, N. J.

## TABLE OF CONTENTS.


| | PAGE |
|---|---|
| OPINION BELOW | 1 |
| JURISDICTION | 1 |
| COUNTER-STATEMENT OF THE CASE | 3 |
| SUMMARY OF ARGUMENT | 12 |
| ARGUMENT: | |
| Point I. Concerning the instruction booklet possessed by the jury panel, it does not appear from the record that the Supreme Court of New Jersey decided any federal question whatever. In any event, meeting petitioner's argument on its merits, there was no violation of due process by the possession of the instruction booklet by the jury panel | 14 |
| Point II. The petitioner was not precluded from a fair hearing nor denied the representation of counsel by the continuation of trial during evening sessions. In any event, the court below did not consider or decide any federal question | 22 |
| Point III. The remark made by the trial judge during counsel's opening statement was not improper and the petitioner was not thereby deprived of a fair trial. In any event, the court below did not decide any federal question | 28 |
| Point IV. The petitioner's confession was voluntarily given and its admission into evidence did not deprive petitioner of due process of law | 31 |

PAGE

Point V. The petitioner was not prejudiced by the Prosecutor's summation; the entire trial, including the Prosecutor's summation was implicit with fundamental fairness ..... 36

Point VI. The manner in which the jury returned its verdict is solely a matter of the interpretation and enforcement of the laws of the State of New Jersey and no federal question is involved 40

CONCLUSION ..... 43

CITATIONS.

*Adamson* v. *California*, 332 U. S. 46 ..... 19, 20
*Avery* v. *Alabama*, 308 U. S. 444 ..... 26

*Chambers* v. *Florida*, 309 U. S. 227 ..... 34

*Dewey* v. *Des Moines*, 173 U. S. 193.....2, 14, 16, 40
*Donnelly* v. *State*, 26 N. J. L. 601 (E. & A., 1857)... 19

*Harris* v. *South Carolina*, 338 U. S. 68 ..... 32

*Lisenba* v. *California*, 314 U. S. 219 .....31, 34, 35

*Marino* v. *Cocuzza*, 14 N. J. Super. 16 (App. Div., 1951) ..... 29

*Palko* v. *Connecticut*, 302 U. S. 319 ..... 19
*People* v. *Fisher*, 340 Ill. 216, 172 N. E. 743 ..... 21
*People* v. *Schoos*, 339 Ill. 527, 78 N. E. 2nd 245..... 21
*People* v. *Weatherford*, 160 P. 2nd 210 ..... 21, 22

*Roberts Elec., Inc.* v. *Foundations & Excavations, Inc.*, 5 N. J. 426 (Sup. Ct., 1950) ..... 30
*Roesel* v. *State*, 62 N. J. L. 216 (E. & A., 1898) .... 33

*Snyder* v. *Massachusetts*, 291 U. S. 97 ..... 20, 21
*State* v. *Barker*, 68 N. J. L. 19 (Sup. Ct., 1902) .... 39
*State* v. *Bunk*, 4 N. J. 461 (Sup. Ct., 1950) ..... 33

PAGE

*State* v. *Cioffe*, 128 N. J. L. 342, aff'd 130 N. J. L. 160 (E. & A., 1943) ..... 39
*State* v. *Cleveland*, 6 N. J. 316 (Sup. Ct., 1951) .... 41, 42
*State* v. *Cooper*, 2 N. J. 540 (Sup. Ct., 1949) ..... 33, 41
*State* v. *Craig*, 9 N. J. Super. 18 (App. Div., 1950).. 28
*State* v. *Greely*, 11 N. J. 485 (Sup. Ct., 1953) ..... 41
*State* v. *Lang*, 75 N. J. L. 1 (Sup. Ct., 1907) ..... 39
*State* v. *Myers*, 7 N. J. 465 (Sup. Ct., 1951) ..... 42
*State* v. *Pierce*, 4 N. J. 252 (Sup. Ct., 1950) ..... 33, 34
*State* v. *Tansimore*, 3 N. J. 516 (Sup. Ct., 1950) .... 40
*State* v. *Vaszorich*, 13 N. J. 99 (Sup. Ct., 1953) 1, 3, 15, 27, 31, 40, 42

*Thomas* v. *State*, 97 Tex. Crim. 432, 262 S. W. 84.... 22
*Turner* v. *Pennsylvania*, 338 U. S. 62 ..... 32, 34
*Twining* v. *New Jersey*, 211 U. S. 78..... 27, 40

*Watts* v. *Indiana*, 338 U. S. 49 ..... 32, 34
*White* v. *Texas*, 310 U. S. 530 ..... 34
*Whitney* v. *California*, 274 U. S. 357.....2, 14, 17, 40
*Williams* v. *State*, 89 Tex. Crim. 334, 231 S. W. 110.. 22

CONSTITUTIONS.

United States:

Amendment V ..... 19
Amendment VI ..... 19
Amendment XIV, Sec. 1 ..... 2, 19

New Jersey:

Art. I, Sec. 1 ..... 2
Art. I, Sec. 10 ..... 2

FEDERAL STATUTE.

28 U. S. C. A. 1257(3) ..... 1

NEW JERSEY STATUTES.

PAGE

N. J. S. 2A:78-4 (formerly R. S. 2:92-4; 2:92-10).. 23
N. J. S. 2A:113-2 (formerly R. S. 2:138-2) ..... 3
N. J. S. 2A:113-4 (formerly R. S. 2:138-4) ..... 3

RULES OF CRIMINAL PRACTICE.

2:7-3 (now Rule 3:7-3) ..... 28

IN THE

# Supreme Court of the United States

OCTOBER TERM, 1953.

---

JOHN LOUIS VASZORICH,

Petitioner,

*vs.*

THE STATE OF NEW JERSEY,

Respondent.

---

## BRIEF FOR RESPONDENT IN OPPOSITION.

### Opinion Below.

The opinion of the Supreme Court of New Jersey is reported in *State* v. *Vaszorich,* 13 N. J. 99. This opinion, together with the dissent filed, is set forth in the petition to this Court at pp. 28-63.

### Jurisdiction.

The petitioner asserts in his petition (p. 5) that the jurisdiction of this Court is invoked under Title 28 U. S. C. A. 1257(3).

It is respectfully submitted that the decision of the Supreme Court of New Jersey in this case, involving the questions presented in the petition, is in full conformity with the provisions of the United States constitution re-

specting due process of law as guaranteed therein,[1] and in conformity with the provisions of the constitution of the State of New Jersey of 1947,[2] and that said Court did not decide any constitutional question of substance in a manner contrary to the decisions of this Court.

Further, certain of the points of argument raised by the petitioner were decided by the court below solely on non-constitutional grounds, and the petitioner is therefor precluded from urging the same questions before this Court on constitutional grounds for the first time. *Whitney* v. *California*, 274 U. S. 357, 360; *Dewey* v. *Des Moines*, 173 U. S. 193, 200.

It is therefore respectfully submitted that this Court should not entertain jurisdiction and issue a writ of certiorari to review the decision of the Supreme Court of New Jersey.

---

[1] Constitution of the United States, Amendment XIV, Section 1.

[2] The constitution of New Jersey, 1947, Art. I, Sec. 1, provides:

"All persons are by nature free and independent, and have certain natural and unalienable rights, among which are those of enjoying and defending life and liberty, of acquiring, possessing, and protecting property, and of pursuing and obtaining safety and happiness."

Article I, Sec. 10, of the New Jersey constitution provides:

"In all criminal prosecutions the accused shall have the right to a speedy and public trial by an impartial jury; to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor; and to have the assistance of counsel in his defense."

## Counter-statement of the Case.

Petitioner herein, John Louis Vaszorich, together with George Eugene Christian Brown and Robert John Berry, were tried and convicted on December 18th, 1951 of feloneously killing Jeremiah Delhagen on September 8th, 1951. The jury's verdict was murder in the first degree,[3] with recommendations of life imprisonment as to Brown and Berry only.[4] The effect of no recommendation as to Vaszorich necessitated a mandatory death penalty.

Vaszorich and Brown appealed their judgments of conviction to the Supreme Court of New Jersey and their convictions were affirmed (*State* v. *Vaszorich*, 13 N. J. 99 (Sup. Ct., 1953).)

Vaszorich alone now petitions this Honorable Court for issuance of a writ of certiorari to review the determinations of the Supreme Court of New Jersey.

The pertinent facts of the case are as follows:

First, however, in reference to statements herein relating to the petitioner's confession and in view of the fact that the petitioner has raised question concerning the volun-

---

[3] N. J. S. 2A:113-2 (formerly R. S. 2:138-2) provides:

"Murder * * * which is committed in perpetrating or attempting to perpetrate * * * robbery * * * is murder in the first degree. Any other kind of murder is murder in the second degree. A jury finding a person guilty of murder shall designate by their verdict whether it be murder in the first degree or in the second degree."

[4] N. J. S. 2A:113-4 (formerly R. S. 2:138-4) provides:

"Every person convicted of murder in the first degree * * * shall suffer death unless the jury by its verdict, and as a part thereof, upon and after the consideration of all the evidence recommend life imprisonment, in which case no greater punishment shall be imposed."

tary nature of his confession, the respondent will confine references to the record to only those matters which were established by Vaszorich's *own testimony* given at the trial.

The chain of events which led to the unwarranted death of Jeremiah Delhagen on the night of September 8th, 1951, began when Brown, driving his uncle's automobile, picked up Vaszorich at his home in Ocean Grove at about 8 P. M. (R645a-39; R646a-9). The two of them then picked up Berry. After driving around for a period of time, the three of them ended up at the home of Jeremiah Delhagen in the Wayside section of Ocean Township (R646a-16). The admitted purpose of going to the Delhagen home was to commit robbery (R656a-36; R657a-28). The plan had been conceived two days before (R652a-23).

Pursuant to their intended design and plan, the three men broke into and entered the home of Jeremiah Delhagen (R647a-11). Once inside the home they admittedly committed robbery by taking $300 from the person of Jeremiah Delhagen (R648a-14; R677a-23 to R678a-34; R579a-14; R579a-29).

In the course of the commission of this robbery, Jeremiah Delhagen was struck severe blows by Vaszorich (R647a-29) in and about the head (R704a-37 to R705a-29). The striking was done with fists and with a heavy wrench taken from Delhagen's cellar. Delhagen was not fully conscious (R678a-40) as the three men jumped on him, pummelled him, and removed his wallet from his trousers (R660a-26; R678a-24).

When the three men left Delhagen's home, they were splattered with his blood (R662a-18) and Vaszorich later attempted to burn his shirt because of this fact (R649a-24; R675a-13). The house was left in shambles.

Jeremiah Delhagen was also covered with his own blood after the three men had finished beating him. His eye was swollen closed and his head was severely lacerated in multiple places.

Mr. Delhagen died on September 10th, 1951 in the Fitkin Memorial Hospital from the severe beating he had received.

Dr. Torren, the County Physician, conducted an autopsy on the body of Jeremiah Delhagen on September 10th, and his testimony at the trial described the extent of the injuries inflicted as follows (R307a to R311a):

> "A. • • • The left eye was ecchymotic—that is, it was discolored—and greatly swollen. The lids of the left eye were bluish black in color. There was a lacerated wound—that is, a torn wound—on the right side of the forehead, which was approximately an inch and a half long. It was almost vertical in direction and on a line with the inner end of the right eyebrow.
>
> Mr. Juska: Excuse me, Doctor. I dislike very much to interrupt, but just so there will be no confusion about it, may the record show that Dr. Torren is referring to the original autopsy notes he made, or to the original autopsy report, a copy of which we have. Is that correct?
>
> The Witness: I don't know if you have a copy or not.
>
> The Court: What are you referring to, Doctor?
>
> The Witness: My notes. A transcript of my notes.
>
> The Court: Your own original notes?
>
> The Witness: Yes, sir.
>
> The Court: And you need those notes to refresh your recollection, I assume?

The Witness: Oh, yes, sir.

The Court: Very well. You may use them then.

A. (Continuing) There was blood in the nose. There was a slight laceration on the bridge of the nose, and there were numerous lacerated wounds of the scalp. There were two parallel, rather parallel, over the vertex right on the top of the head. One was about an inch and a half long, and the other about two inches long. They were diagonal in position with the right ends of the lacerations toward the front of the body.

There was a tear on the right temple approximately one inch long, and also a triangular tear—that is, consisting of two branches—that was also on the right temple, and that was about a little less than an inch and a half long on each arm of the triangle.

There were three lacerations on the top of the left ear; that is, of the pinna of the ear, this portion. It was a transverse laceration on the back of the vertex; that is, in this portion back here, transverse meaning crossways of the body, and that was two inches long; and below that one were two more smaller ones which were in an anteroposterior direction.

There was one on the occiput or base of the skull which was an inch and a half long, and there was a small laceration of the scalp above the pinna of the left ear.

There was blood in the left ear.

There was a contusion—that is, a bruise—and a slight laceration on the left shoulder at the base of the neck in this area.

There was a bruise on the outer side of the left arm at the juncture of the upper and middle thirds, about in this area, and another on the left elbow.

There was a bruise and fracture of the middle finger of the left hand, and a lacerated wound of the distal portion of the fourth finger of the left hand.

There was a bruise on the right elbow, one on the back of the right hand. There were two small lacerations on this surface of the right wrist, and numerous small lacerations and bruises on the anterior surfaces—that is, the front surface—of both legs.

On dissecting back the scalp, retracting the scalp, there was found what we call a hematoma—that is, an accumulation of blood in the loose tissues—covering practically the entire top of the skull, the entire cranium from side to side.

There was a slightly depressed fracture of the cranium in the left parietal area. That is this area right in here above the ear. This fracture was a linear fracture with slight depression of the inner table, and it was rather Z shaped. That is, it came down like this, back, and then down.

I should explain, I think, that the skull is composed of two layers of dense bone with an area of soft or spongy bone between them, and in cases of fracture these tables, as we call them, may separate in the fractured area, and that is what had transpired in this fractured area. The outer table, the plane of contour was practically uniform—in other words, the outer table did not demonstrate depression—but the inner table was displaced inward slightly.

Down at the base of the brain and lying in a little cup-shaped depression on the floor of the cranium is a body known as the pituitary or hypophysis cerebri, and underneath this there was hemorrhage. Underneath this pituitary body there was hemorrhage, and just to the side of this fossa or cup-shaped depression there was a fracture, a linear fracture in the bone.

Now, the skull is lined with a membrane, a tough fibrous membrane, very tough, and between the skull and this membrane in this case was an enormous extravasation of blood which had spread over all surfaces so that practically the entire dome of the

skull presented this hemorrhagic area. Now, it wasn't very thick because of the denseness and tenseness of the structure in that area, but it had spread over the entire dome of the cranium. That is, on the under side of the bone, you understand, as we had on the outer side of the skull we had the hemorrhage under the scalp, on the inside of the skull we had this hemorrhage between the dura and the bone, the dura being the membrane which lies next to the bone and in this case was separated by the hemorrhage.

Then on exposing the brain, going through this dura and exposing the brain, there was hemorrhage, what we call subarachnoid hemorrhage, that is, hemorrhage between the brain substance itself and the coating or covering of the brain proper, hemorrhage over all surfaces of the brain.

The brain also has cavities in it which contain fluid, and there was the blood stained fluid in each of those cavities.

I also opened the middle ear on each side and on the left side I found blood in the left middle ear, which means that there was a fracture in that locality, although the fracture was not demonstrable with the naked eye, but the presence of blood there, in the absence of a perforating wound from the outside, means fracture."

Dr. Torren further testified that there were all together "eighteen lacerations, of which fourteen were on the head and four others distributed on the shoulder, arm, wrist and hand" (R314a-15).

Vaszorich admitted that he had obtained a large wrench and a meat cleaver from Mr. Delhagen's cellar before entering the house (R647a-17) and that these weapons were taken into the house (R647a-21). Vaszorich struck Jeremiah Delhagen with this wrench.

Dr. Torren also testified that he conducted tests upon the wrench and found "blood on almost all surfaces of this instrument" (R319a-31). The wrench was found by Officer Hundertpfund on the Delhagen front lawn the morning following the attack (R218a-14).

The foregoing is a concise outline of the matters which were *testimonially* brought to the attention of the court and jury. The reported record is scattered and much of the testimony concerns the question of the circumstances under which the confessions of the defendants were made.

The confession of the petitioner is attacked in his brief (Point D) as having been given involuntarily and therefore lacking in the due process of law required by the Fourteenth Amendment. In support of this contention, he makes a recital of facts (pp. 83-84) which is short and graphic, but which is not in accord with the record. The statement (p. 83) that Vaszorich "* * * was questioned for hours on end every day by waves of inquisitors * * *" is purely a figment of someone's imagination. The record is completely barren of any such activity.

Vaszorich was picked up by the police on the morning of October 1st, 1951. His confession was made on the afternoon of October 4th. Just what took place during this period of time is set forth in Vaszorich's *own testimony* taken at the trial. What did his testimony show?

After being picked up by the police on the morning of October 1st (R555a-38), Vaszorich was taken to the Ocean Grove Police Station (R556a-9). From there he was taken to the Deal Police Station (R556a-20). At Deal he was questioned, *but not about the present case* (R557a-24). On the evening of October 1st, he was first questioned about

the Delhagen murder (R558a-23). He was questioned from 10:30 P. M. until about 1:30 A. M. (R558a-36; D559a-10). He was then allowed to sleep out the night.

The next morning, October 2nd, Vaszorich was taken before Judge Hurley, Ocean Township magistrate, and was charged with the murder of Jeremiah Delhagen (R559a-24). From this hearing he was taken to Freehold (R559a-39). From Freehold, Vaszorich and Berry were taken to the scene of a prior crime *not connected with the Delhagen killing* (R560a-29). No questioning of Vaszorich took place on October 2nd (R560a-36).

On Wednesday, October 3rd, Vaszorich was taken out into the woods to investigate a phase of the crime charged (R561a-12). He was not questioned when he was brought back to the jail (R561a-21).

On Thursday, October 4th, three days after Brown and Berry had confessed the Delhagen killing, Vaszorich was questioned by the Prosecutor's Office, at which time he made his written confession. No claim of any *continued* questioning was made from the witness stand (R561a-24). The questioning started about 2:30 P. M. (R564a-39) and the confession was given at 4:45 P. M. (R507a-26).

On cross examination, Vaszorich admitted that he signed the confession given to the Prosecutor (R564a-31) and that he initialed all the pages (R564a-32). There was no testimony by Vaszorich that he was ever put in fear or was ever made promises of leniency or reward if he confessed. Nor is there any testimony that he was ever threatened or that physical or mental coercion was used upon him.

After Vaszorich's confession was transcribed—it had been taken stenographically—he read and signed it in the presence of Joseph C. Kingdon, Court reporter (R508a-12).

Charles A. Johnson, reporter for the Asbury Park Press, testified that he was present when Vaszorich signed his confession and that when Vaszorich was asked whether the confession was voluntary or forced upon him, Vaszorich replied "No, no, it is all my own" (R515a-42).

Paul Thead, reporter for the Long Branch Record, testified that he was also present when the confession was signed and that he also heard Vaszorich say that the confession was voluntarily given (R523a-20).

Harry Zuckerman, Monmouth County detective, testified that he was also present when Vaszorich made his confession and that Vaszorich had been informed, prior to giving the statement, that the confession would have to be voluntary and that no promises were being held out to him or force used (R528a-25). The petitioner was also informed that whatever he might say could be used against him in a court of law (R529a-13). Mr. Zuckerman also testified that, in fact, the confession was voluntarily given by Vaszorich and that no promise of reward or immunity was made nor was force or coercion used (R528a-30).

Officer Garrity of the Ocean Township Police was also present at the time of the confession and his testimony was the same as Detective Zuckerman (R543a-11 to R544a-14).

The testimony of these *impartial* witnesses stood uncontradicted and unimpeached on cross examination.

## Summary of Argument.

POINT I—The jury panel from which the trial jury was drawn had been issued an instruction booklet concerning general propositions of law. The propriety of issuance of this booklet was argued before the Supreme Court of New Jersey. The opinion filed by the Court below shows that this booklet question was not considered or decided upon any constitutional ground. Petitioner attempts to raise a federal question before this Court for the first time and the respondent submits that this Court acquires no jurisdiction to review a judgment of a state court unless it affirmatively appears on the face of the record that a federal question was decided by the Court below.

In any event, meeting petitioner's argument on its merits, the booklet was timely withdrawn from the jury panel before trial commenced and with appropriate instructions from the trial judge to accept on the law pronounced by the court. Petitioner received a fair hearing and there was no violation of due process in his conviction.

POINT II—Petitioner's trial counsel was appointed weeks in advance of trial. Prior to commencement of litigation, the court instructed counsel that evening sessions would be held. It is submitted by respondent that petitioner was not deprived of representation of counsel by continuation of trial during evening sessions. The requirement of due process is satisfied when there is a fair hearing.

Further, no federal question was decided by the court below.

POINT III—The instruction by the trial judge to petitioner's counsel during his opening to the jury to his

defense, if he had one, was within the province of comment by the trial judge and petitioner was not thereby deprived of a fair hearing.

Further, no federal question was decided by the court below.

POINT IV—The record shows that treatment of petitioner prior to his confession was far above the minimum standards of fundamental fairness. Further, petitioner *admitted* from the witness stand each element necessary under New Jersey law to warrant and justify his conviction.

POINT V—The Prosecutor was justified in commenting in his summation upon matters initiated by petitioner's counsel in his opening and closing statements, although the comments were not strictly confined to the record. The comments were approved by the Supreme Court of New Jersey and the entire trial was circumscribed with fundamental fairness.

Again, there was no federal question decided by the court below.

POINT VI—The manner in which the jury returned its verdict was approved by the Supreme Court of New Jersey. The question raised by petitioner relates solely to an interpretation and enforcement of the law of the State of New Jersey and no federal question was decided or involved.

# ARGUMENT.

## POINT I.

**Concerning the instruction booklet possessed by the jury panel, it does not appear from the record that the Supreme Court of New Jersey decided any federal question whatever.**

**In any event, meeting petitioner's argument on its merits, there was no violation of due process by the possession of the instruction booklet by the jury panel.**

The jurisdictional rule of this Honorable Court as set forth in the case of *Whitney* v. *California,* 274 U. S. 357, 360 is as follows:

> "It has long been settled that this Court acquires no jurisdiction to review the judgment of a state court of last resort on a writ of error, unless it affirmatively appears on the face of the record that a federal question constituting an appropriate ground for such review was presented in and expressly or necessarily decided by such state court (citing cases)."

Again, it has been further said in the case of *Dewey* v. *Des Moines,* 173 U. S. 193, 200:

> "A claim or right which has never been made or asserted cannot be said to have been denied by judgment which does not refer to it. *Hamilton Company* v. *Massachusetts, supra.* (6 Wall. 632). A point that was never raised cannot be said to have been decided adversely to a party, who never set it up or in any way alluded to it. Nor can it be said that the necessary effect in law of a judgment, which is silent upon

> the question, is the denial of a claim or right which might have been involved therein, but which in fact was never in any way set up or spoken of." (Citation added).

A written opinion filed by the highest state court is part of the record before this Court. It is of necessary importance in determining whether the state court actually considered a federal question in reaching its decision. A necessary corollary of this inquiry is that any discussion appearing in a dissenting opinion is of no import in determining the existence of a federal question.

Then, the preliminary inquiry is whether or not the highest court of the state dealt with and disposed of a federal question. In the instant case there is not even an intimation in the majority opinion that a federal question was involved. The opinion (*State* v. *Vaszorich*, 13 N. J. 99, 112; petition pp. 35-40) disposed of the entire instruction booklet question in the following manner (*State* v. *Vaszorich*, 13 N. J. 99, 114; petition pp. 38-39):

> "* * * the irregular matter came to light at a time when all parties and the trial court had a full and ample opportunity to take steps to avoid any improper influence of the manual upon the minds of the jurors and prospective jurors. The real question is whether in the circumstances of the case; with particular reference to the precautions taken by the trial judge, enough was done to dispel the tendency of the contents of the manual for improper influence. We think the prompt and firm action of the trial judge disclosed by the excerpt from the record above was sufficient in the circumstances. Apart from the fact that no motion for mistrial was made, or even if one had been made and was denied, it is not generally necessary that a mistrial be de-

> cleared. It will ordinarily suffice that the trial judge instruct the jury in definite and unexceptionable terms upon the right of the matter, which we think the trial judge did in this case, both at the time and later in his charge, when he instructed them that the jurors were to decide the case upon the evidence alone according to the law as he gave it to them."

Not only did the Supreme Court of New Jersey not decide a federal question in reaching its determination on this instruction booklet question, but the petitioner did not even broach a federal question in his briefs presented to that court. The petitioner filed his original appellant's brief with the Supreme Court of New Jersey in which he undertook a seven page argument on this booklet question. Later he filed a supplemental brief in which he undertook a seventeen page argument on the very same question. Nowhere in either of these two briefs did the petitioner even mention or suggest that he was raising a constitutional question.

As stated in *Dewey* v. *Des Moines,* 173 U. S. 193, 198:

> "In *Oxley Stave Company* v. *Butler County,* 166 U. S. 648, it was held that the Federal question must be specially taken or claimed in the state court; that the party must have the intent to invoke, for the protection of his rights, the Constitution or some statute or treaty of the United States, and that such intention must be declared in some unmistakeable manner, and unless he do so this court is without jurisdiction to reexamine the final judgment of the state court upon that matter (citing cases). In other words, the court must be able to see clearly from the whole record that a provision of the Constitution or act of Congress is relied upon by the party who brings the writ of error, and that the right thus claimed by him was denied. * * *"

It is not enough that there may be somewhere hidden in the record a question which, if it had been raised, would have been of a federal nature. *Whitney* v. *California*, 274 U. S. 357, 362.

However, in order to present full argument on all points raised by the petitioner and in order to meet all of his arguments on their merits, the respondent offers the following.

Recognizing that the booklet possessed by the members of the jury panel contained inaccurate statements of the law of New Jersey, what steps were taken by the trial court to remove this improper influence?

First: The existence of the booklet in the possession of the jury panel was discovered *before* the actual trial had started.

Second: Just as soon as the existence of the booklet in the possession of the jury panel became known to the court, certain and decisive action was immediately taken to withdraw the booklet as a possible influence in the course of the forthcoming trial. Any possible harm was completely cured by the following instruction promptly given to the jury panel (R15a):

> "In view of the fact that the law is given to you by the Court and under the system you must take the law from the Court and not from the Sheriff, I am asking that these booklets be picked up by Sheriff White now."

All of this took place before the trial jury was fully chosen; before one shred of evidence was heard; before the trial jury was sworn; and all in the presence of the

petitioner and his counsel. The respondent submits that the petitioner's entire trial was completely circumscribed with that element of fundamental fairness which is essential to our concept of fair hearing.

THIRD: At the close of the entire trial, the trial jury was instructed by the court:

(R880a):

> "The function of the Court is to instruct the jury with reference to the principles of law governing this case. You, however, are the sole judges of the facts, the weight of the testimony, the credibility of the witnesses, the inferences to be drawn from the evidence, and the ultimate conclusions to be reached upon all of the facts."

(R889a):

> "I charge you that the defendants are presumed to be innocent until proven guilty and they are entitled to the benefit of any reasonable doubt arising upon the evidence. The burden is upon the State to prove beyond a reasonable doubt every material element of the crime, and if upon such proof there be a reasonable doubt with regard either to the guilt of anyone of the accused or to the degree of criminality, he is entitled to the benefit of the doubt. Such burden of proof remains upon the prosecution throughout the whole case and it never shifts.
>
> "When we speak of reasonable doubt, it is not a mere possible doubt, because everything relating to human affairs and depending upon moral evidence is open to some possible or imaginary doubt. Reasonable doubt refers to that state of the case which, after the entire comparison and consideration of all the evidence, leaves the minds of the jurors in that condition that they cannot say they feel an abiding

> conviction to a moral certainty of the truth of the charge. The evidence must establish the truth of the fact to a moral certainty, a certainty that convinces and directs the understanding and satisfies the reason and judgment of those who are bound to act conscientiously upon it, and, ladies and gentlemen, if after carefully considering the evidence, giving the accused the benefit of reasonable doubt, you are led to the conclusion that they or anyone of them are guilty, you should so declare by your verdict."

This definition of reasonable doubt is in complete accordance with the leading decision of New Jersey, and is couched in the very language of that case. *Donnelly* v. *State,* 26 N. J. L. 601 (E. & A., 1857). The principal objection of the petitioner to the instruction booklet was that it contained inaccurate definition of reasonable doubt (brief p. 70). The trial court's charge left no doubt in the juror's minds as to what law they should apply and what the law of reasonable doubt was in New Jersey.

In petitioner's brief (p. 70) he argues that, *inter alia,* he was deprived of rights guaranteed to him under the Fifth and Sixth Amendments. Here petitioner has erred in his argument for it is clear that the provisions of the Fifth and Sixth Amendments do not apply to state action, nor do they apply to state action through the Fourteenth Amendment. *Palko* v. *Connecticut,* 302 U. S. 319, 323; *Adamson* v. *California,* 332 U. S. 46, 53. The petitioner quotes at length in his brief (p. 70) from *Palko* v. *Connecticut, supra,* concerning the relationship between state action and due process, but a careful reading of that case fails to disclose any such quotation ascribed to that case by the petitioner.

The basic concept of due process as applied to state action through the Fourteenth Amendment is that of fair

hearing. As applied in criminal matters, the inquiry is always one to determine whether there has been observance of the fundamental fairness essential to the very concept of justice. The purpose of due process is not to protect the accused against a proper conviction but against an unfair conviction, *Adamson* v. *California,* 332 U. S. 46, 53.

Petitioner's argument in his brief (p. 76) that the exposure of the jury panel to the instruction booklet in question was in effect a deprival of his right to be present at every stage of the proceeding is too tenuous to merit consideration. The jury panel was given the booklet when the panel was first formed and the booklet was taken from the panel, with appropriate corrective instruction, before the trial jury was chosen and before trial was actually commenced. In the case of *Snyder* v. *Massachusetts,* 291 U. S. 97, 107, it was said:

> "So far as the Fourteenth Amendment is concerned, the presence of a defendant is a condition of due process to the extent that a fair and just hearing would be thwarted by his absence, and to that extent only."

Further, the same court said at page 116 (291 U. S. 97, 116):

> "* * * The Fourteenth Amendment has not said in so many words that he must be present every second or minute or even every hour of the trial. If words so inflexible are to be taken as implied, it is only because they are put there by a court, and not because they are there already, in advance of the decision. Due process of law requires that the proceedings shall be fair, but fairness is relative, not an absolute concept. It is fairness with reference to particular conditions or particular results. 'The

> due process clause does not impose upon the States a duty to establish ideal systems for the administration of justice, with every modern improvement and with provision against every possible hardship that may befall'. *Ownbey, Morgan, supra* (256 U. S. 94). * * *" (Citation added).

The holding of the *Snyder* case was that the state of Massachusetts did not deprive the defendant of due process of law when he was excluded from a view of the scene of the crime by the jury. The court said (291 U. S. 97, 106) that due process assured the defendant the privilege of presence at his trial, but not when his presence would merely be a useless gesture. The reasoning in the *Snyder* case completely destroys petitioner's argument in the present case wherein he argues (brief p. 76) that he was deprived of due process when he was not present when the jury panel was exposed to the instruction booklet.

Petitioner quotes at length in his brief (pp. 72-75) from decisions of sister states which this respondent does not consider applicable to support petitioner's arguments.

In *People* v. *Schoos*, 339 Ill. 527, 78 N. E. 2nd 245, 251 and in *People* v. *Weatherford*, 160 P. 2nd 210, the respective courts were confronted with the problems of booklet instructions possessed by the jurors right up to and including the time of trial and jury deliberations. No such situation existed in the present case where the booklet was discovered and withdrawn from the jury, with appropriate corrective instruction, before the jury was sworn or trial commenced.

In *People* v. *Fisher*, 340 Ill. 216, 172 N. E. 743, 756, the entire jury panel was given general oral instructions on their official duties. The Supreme Court of Illinois re-

marked that such practice should be indulged in with caution in view of the fact that after a jury is accepted and sworn only written instructions may be given.

In *Williams* v. *State*, 89 Tex. Crim. 334, 231 S. W. 110, 111, and in *Thomas* v. *State*, 97 Tex. Crim. 432, 262 S. W. 84, 85, the respective courts orally lectured the jury before trial, but after being sworn, on relevant duties. Again, these situations are readily distinguishable from the present case where, as previously stated, the booklet was discovered and withdrawn from the jury before the selection of the jury was completed.

In all of the cases cited by petitioner the improper instructions were not brought into issue until *after* trial was completed. In only one of the cases (*People* v. *Weatherford*) was the question of due process even mentioned.

It is respectfully submitted that the petitioner has not only failed to demonstrate the existence of a federal question which is the *sine qua non* of jurisdiction before this Court, but he has further failed to show that his conviction was without due process of law in any respect.

## POINT II.

**The petitioner was not precluded from a fair hearing nor denied the representation of counsel by the continuation of trial during evening sessions.**

**In any event, the court below did not consider or decide any federal question.**

The trial of this matter commenced on Monday, November 26th, 1951, and in accordance with a New Jersey statute

in cases of this nature,[5] the *voir dire* of prospective jurors was conducted on an individual basis under oath. The *voir dire* continued until the morning of Monday, December 10th, when a panel of 14 jurors was finally drawn. During the two weeks period from November 26th to December 10th, a total of 176 prospective jurors were individually examined.

On the afternoon of Friday, December 7th, only 13 jurors had been selected. There were no more members of the general panel to be examined in order to select the 14th juror. Efforts by the sheriff to obtain additional talesmen was unsuccessful. The matter was adjourned until Monday morning, December 10th, with the clear direction from the trial judge that evening sessions would be held, if necessary, in order to expedite the matter to a completion. No objections to this announcement were made by counsel. The anouncement was made by the court in the following manner:

> "The Court: Ladies and gentlemen, the Court is sorry to announce that the Sheriff acknowledges defeat. He has been unable at this late hour of the day to procure the services of any talesmen, although he has contacted a half a dozen organizations, including the mill here in Freehold. Therefore of necessity I can't get any more talesmen for today, but I am directing the Sheriff to bring in thirty-five talesmen, if it is possible for Monday morning, and so that the jury may not unnecessarily get con-

---

[5] N. J. S. 2A:78-4 (formerly R. S. 2:92-4; 2:92-10) Examination of Jurors

"* * * In all cases in which a death penalty may be imposed, the examination as to competency shall be under oath, but in other cases it shall be made without putting the juror under oath. * * *"

cerned, it will be my purpose after this case gets rolling to sit much past the four o'clock adjournment hour, and if it becomes necessary I will sit at night so that we will get finished. I will see you Monday morning."

On Monday, December 10th, after the 14th juror was chosen and the jury impanelled, the trial judge announced to counsel that the court would sit in evening session that evening. No objections to this direction was made by trial counsel. This announcement by the court was made as follows:

"Mr. Frankel: I should like to ask your Honor about how long the openings will take so that I can figure on when to have my first witnesses.

The Court: Well, the openings should not take too long. A half hour should be enough.

Mr. Frankel: Yes. Well, I won't take that long.

The Court: Maybe shorter than a half hour; so much the better. Incidentally, I am going to work until nine o'clock tonight. So guide yourselves accordingly."

Later in the day of Monday, December 10th, counsel for the defense requested audience with the trial judge at the side bar (R109a to R110a) to indicate that they did not desire to sit in evening session. It is important to note that no specific objection was made by counsel to the extension of trial hours. The court observed that permission had been obtained from the Chief Justice to extend trial time into evening session (R109a-28).

The court sat in evening session on Monday, December 10th (R128a-27), Tuesday, December 11th (R338a-19), and Wednesday, December 12th (R527a-31). On Thursday, December 13th, the State rested its case (R634a-14) and the

defense case was begun. The defendants presented their case on Friday, December 14th and completed the same early on the morning of Monday, December 17th. After a short rebuttal by the State, the summations were made on the afternoon of December 17th.

Actual trial time, *in litigation,* was six days, including the three evening sessions. The foregoing matters have been outlined merely to demonstrate the weakness of the arguments presented by petitioner wherein he argues that the trial judge erred in "forcing" the trial into overtime sessions and thereby caused the petitioner to be precluded from having a fair and impartial trial.

The observation of the petitioner (brief p. 79) that "bitter objection" was raised by trial counsel to the overtime sessions does not accord with the record (R109a to R110a-20). In fact, Mr. McCurrie, counsel for the defendant Berry, stated that he was not averse to reasonable overtime sessions (R109a-30) and Mr. O'Hagan, counsel for the defendant Brown, said that he felt that way too (R110a-9).

The alleged "breakdown" (petitioner's brief p. 79) of Mr. McCurrie is evidenced by an unenlightening entry in the record (R777a-36) wherein the court asked Mr. McCurrie if he wanted a recess. The fact of the matter is that Mr. McCurrie began to sob at that point in the trial, and after a few minutes composure he again resumed examination of his witness. Mr. McCurrie is a life long friend of the Berry family and it is indeed little wonder that he might have had occasion to shed a tear during the course of questioning which concerned the Berry family. Mr. McCurrie did not collapse and he certainly did not have a breakdown.

The cases cited by the petitioner in support of his arguments (brief p. 79) are not appropriate to the facts of the instant case. Certainly after weeks of preparation for the trial by defense counsel, it cannot reasonably be said that the litigation was unduly expedited at the expense of justice. There was no abuse of judicial discretion in the ordering of evening sessions.

The case of *Avery* v. *Alabama*, 308 U. S. 444, cited by petitioner to support his argument that the three evening sessions deprived him of his representation of counsel, does not lend the desired support to petitioner's position. In the *Avery* case the accused was arraigned on a Monday and counsel was appointed to represent him the same day. The case was tried, over objection of counsel, the following Wednesday, two days later. This Court held that the accused had not been denied the benefit of assistance of counsel.

In the instant case, counsel was appointed weeks in advance of trial; motions were made to examine evidence; witnesses were interviewed and the scene of the crime was visited and examined. Certainly, in view of the trial court's advance notice of intended evening sessions, the petitioner cannot say that he was denied the assistance of counsel. As stated in the *Avery* case, *supra*:

> "In determining whether petitioner has been denied his constitutional right to assistance of counsel, we must remember that the Fourteenth Amendment does not limit the power of the States to try and deal with crimes committed within their border, and was not intended to bring to the test of a decision of this Court every ruling made in the course of a state trial. Consistently with the preservation of constitutional balance between state and federal

> sovereignty, this Court must respect and is reluctant to interfere with the state's determination of local social policy. * * *"

It is submitted that the determination to carry the trial time into evening sessions was purely a matter of local policy. This court has steadfastly maintained that it has no authority to determine whether a state court has erred in the interpretation of enforcement of its own laws. *Twining* v. *New Jersey,* 211 U. S. 78, 91. The basic element of the exercise of jurisdiction by this Court is the determination of a federal question by the state court below, and, as stated in the *Twining* case, *supra* at page 91, "* * * If the right here asserted is not a Federal right, that is the end of the case. * * *"

Examination of the opinion filed by the Supreme Court of New Jersey in this case (*State* v. *Vaszorich,* 13 N. J. 99, 115-116; petition pp. 40-41) clearly demonstrates that no federal question was decided or even considered.

## POINT III.

**The remark made by the trial judge during counsel's opening statement was not improper and the petitioner was not thereby deprived of a fair trial.**

**In any event, the court below did not decide any federal question.**

The rules of Criminal Practice of the New Jersey courts provide that in a criminal proceeding the State first makes its opening, followed by the opening for the defense.[6] (Rule 2:7-3). The rule appears not to be mandatory, and the defense may waive the right to open. *State* v. *Craig*, 9 N. J. Super. 18, 22 (App. Div., 1950). However, if the defense chooses to make an opening statement, it becomes incumbent to outline therein the defense to the crime charged. (Rule 2:7-3). The defendant, or his counsel, cannot choose to make an opening, and then, without stating his defense, blithely proceed to indulge in philosophies disconnected with the defense.

Counsel for Vaszorich ignored the provision of Rule 2:7-3 wherein he was required to outline his defense to the jury. Instead, counsel indulged in unrelated topics, and, at a point where he was about to reiterate what one of the prospective jurors had said on *voir dire* about the "help and benefit of the strong arm of a father", the Prosecutor

---

[6] *Rule* 2:7-3 (now Rule 3:7-3) provides:

"Before any evidence is offered at a trial, the state shall make an opening statement to the jury. Immediately thereafter the defendant or his attorney shall make an opening statement outlining his defense. Failure of the defendant or his attorney to make such opening at that time shall bar any further opening by the defendant or his attorney throughout the trial."

interposed an objection. The court took the opportunity to remind counsel of his duty to outline his defense, if he had one, and thereupon counsel *still* continued his perusal of matters not pertaining to a statement outlining his defense.

Another objection was interposed by the Prosecutor. Counsel then remarked that "We are not guilty at this stage of the proceedings, and that is my plea". This statement marked the terminal point of his opening to the jury.

It is to be noted that the defense, as stated by counsel for Vaszorich, was not a forthright plea of "not guilty", but was merely a reiteration of the law of New Jersey, i. e., that every accused is deemed to be innocent until proven guilty. However, the court accepted counsel's plea as being one of "not guilty" and the trial proceeded.

The trial court did not "rebuke" counsel during his opening to the jury, as the petitioner now argues in his brief (p. 80), but the court merely instructed counsel that since he chose to make an opening statement, he must include therein an outline of his defense (R30a).

In support of petitioner's argument, quotation at length is made from the case of *Marino* v. *Cocuzza,* 14 N. J. Super. 16 (App. Div., 1951) (brief p. 82) wherein the court spoke of the duty of a trial judge in reference to his function of presiding over the trial. The quotation, however, *stopped* just before the point in the opinion (p. 23) wherein the court observed:

> "It is undoubtedly within the province of the trial court to admonish and rebuke counsel as occasion may require."

It is submitted that on the facts in the present case, the trial court had ample occasion to instruct counsel that since he chose to make an opening statement, he must outline his defense. Wherein lies the alleged prejudice to the petitioner is difficult to perceive.

In the case of *Roberts Elec., Inc.* v. *Foundations & Excavations, Inc.*, 5 N. J. 426 (Sup. Ct., 1950), the court stated (p. 430):

> "While it is well recognized that the parties have the right to have their counsel sum up (open) the case to the jury, it is also well established that the trial court has the authority as well as the duty to keep the arguments of counsel as well as their conduct and actions within the limits of courtroom decorum." ("open" added).

The *Roberts* case was one in which the entire appeal was predicated upon alleged improper remarks made by the trial judge. During the entire trial the court interjected terse remarks concerning witnesses and the offers of evidence. Upon the offering of a bill of $2.54, the court is reputed to have remarked "Does anybody have $2.54 that they can give Mr. McGann so that we can get this matter over"; and during defense counsel's summation the court told him to "Stop kissing the jury."

These remarks of the court in the *Roberts* case were found to be insufficient grounds upon which to grant a reversal. Certainly those remarks were far and beyond any alleged improper remark made by the trial judge in the instant case. A trial judge is necessarily allowed wide latitude in the conduct of a trial consistent with established judicial practice. It is submitted that the trial of the present matter was in all things consistent with established

judicial practice, coupled with the exercise of sound judicial discretion, and the petitioner was not deprived of a fair trial.

In any event, respondent again wishes to call this Court's attention to the fact that the court below did not decide any federal question in reaching its determinations. In fact, the court below regarded the argument so tenuous as to summarily dispose of it in the following language (*State* v. *Vaszorich*, 13 N. J. 99, 118; petition pp. 42-43):

> "Vaszorich contends that he was prejudiced by the action of the trial judge interrupting his counsel's opening to the jury to press counsel to state his defense. We have examined the colloquy at that point and perceive no impropriety of the trial judge in the circumstances."

## POINT IV.

**The petitioner's confession was voluntarily given and its admission into evidence did not deprive petitioner of due process of law.**

The factual pattern upon which the State of New Jersey predicated the admission of petitioner's confession into evidence has been previously outlined herein in the Counter-statement of the Case. The record of petitioner's own testimony discloses that he made his confession freely and without coercion or extortive methods. The manner in which he was detained and treated by the law enforcement officers was far within the minimum requirements of due process.

The test modernly applied to situations of this nature is set forth in *Lisenba* v. *California*, 314 U. S. 219, 236:

> "* * * The aim of the requirement of due process is not to exclude presumptively false evidence, but to prevent fundamental unfairness in the use of evidence, whether true or false. * * *
>
> "As applied to a criminal trial, denial of due process is the failure to observe that fundamental fairness essential to the very concept of justice. In order to declare a denial of it we must find that the absence of fairness fatally infected the trial; the acts complained of must be of such quality as necessarily prevents a fair trial. Such unfairness exists when a coerced confession is used as a means of obtaining a verdict of guilt. * * *"

The specific matters into which inquiry is made in order to satisfy the foregoing generalization are characterized by such phrases as "sustained pressure", "overbearance," "suction process," and "wrenching of evidence which could not be extorted in open court with all its safeguards." *Watts* v. *Indiana,* 338 U. S. 49; *Turner* v. *Pennsylvania,* 338 U. S. 62; *Harris* v. *South Carolina,* 338 U. S. 68.

In the phrase "wrenching of evidence which could not be extorted in open court with all its safeguards" lies the frailty of petitioner's arguments in the instant case. When petitioner took the witness stand in his own behalf to testify as to the voluntary nature of his signed confession, he *admitted,* in court, that he looked through the statement after it was transcribed (R564a-16) and that he signed the statement and initialed each page (R564a-31).

In contradiction to petitioner's present argument wherein he speaks of "waves of inquisitors" (brief p. 83) and "days of psychological whipsawing" (brief p. 86), it must be observed that on examination restricted to the question of the voluntary nature of his confession, Vas-

zorich *volunteered* that "I never stated that I was being questioned the whole day" (R566a-41).

The record discloses that the circumstances surrounding petitioner's confession were not only implicit with "fundamental fairness," but that the confession was an expression of free choice characterized by spontaniety. By petitioner's own testimony, the actual questioning concerning the Delhagen murder consisted of three hours on the evening of October 1st (R558a-36; R559a-10), and about two and one-half hours on the afternoon of October 4th, when he gave his confession (R564a-39; R507a-26). He was never "overborne," nor was he a victim of "sustained pressure" or the "suction process of interrogation."

Confessions having this clear element of voluntariness are not violative of the due process clause of the Fourteenth Amendment. Confinement in jail is a circumstance to consider in arriving at the voluntariness of a confession, but, standing alone, such detention is not sufficient to brand a confession as "involuntary." *Roesel* v. *State*, 62 N. J. L. 216, 227, 228 (E. & A., 1898).

Vaszorich further argues (brief p. 84) that his detainment was illegal because he was not brought before a magistrate until the day following his arrest. This circumstance is insufficient to detract from a finding that his confession was voluntarily given. *State* v. *Cooper*, 2 N. J. 540 (Sup. Ct., 1949); *State* v. *Pierce*, 4 N. J. 252 (Sup. Ct., 1950); *State* v. *Bunk*, 4 N. J. 461 (Sup. Ct., 1950). In any event, it is submitted that Vaszorich was not questioned concerning the Delhagen murder until 10:30 P. M. on the day of his arrest (R558a-36) and he was promptly brought before the magistrate of Ocean Township the next morning.

The facts of the cases cited by petitioner in his brief are known to this court and no good purpose would be served to repeat them at length here. *Watts* v. *Indiana*, 338 U. S. 49; *Turner* v. *Pennsyvania*, 338 U. S. 62; *White* v. *Texas*, 310 U. S. 530; *Chambers* v. *Florida*, 309 U. S. 227. It suffices to say that the various factual developments set forth in these cases disclose extreme cases of coercion and duress. In his argument, petitioner saw fit to quote the *law* of these cases, but neglected to recite the extreme factual patterns upon which the law was predicated. As stated in *Lisenba* v. *California, supra* (p. 237):

> "Where the claim is that the prisoner's statement has been procured by such means, we are bound to make an independent examination of the record to determine the validity of the claim. * * *"

The respondent submits that on the facts presented in the instant case, there is a clear showing that petitioner's confession was voluntarily made and the making thereof was circumscribed by the "fundamental fairness" spoken of in the cases. *Lisenba* v. *California, supra.* Despite the imaginative and graphic language employed by Vaszorich in his argument, it is a well recognized principle of law and of logic that an argument can be no stronger than the evidence upon which it is predicated. The arguments in the present case are not supported by the evidence. "Whether a statement or confession is voluntary depends on the facts in each case. * * *" *State* v. *Pierce, supra.* (4 N. J. 252).

In line with this Court's pronouncement that the requirement of due process is to prevent fundamental unfairness in the use of evidence, whether true or false, and that

in order to declare a denial of due process there must be a finding that the absence of fairness fatally infected the trial (*Lisenba* v. *California, supra,* 236), the respondent believes it worthy of note that the petitioner took the witness stand in his own defense and thereupon admitted each element necessary to support his conviction. These admissions may be outlined as follows:

(1) Petitioner admitted that he went to the home of Jeremiah Delhagen with the intent of robbing him (R656a-36; R657a-28);

(2) Petitioner admitted breaking and entering the home of Jeremiah Delhagen (R647a-11);

(3) Petitioner admitted committing robbery by taking $300 from the person of Jeremiah Delhagen (R648a-14; R677a-23 to R678a-34; R579a-14; R579a-28);

(4) Petitioner admitted that Jeremiah Delhagen was struck repeated blows until he was barely conscious (R678a-40; R647a-29);

(5) The undisputed medical testimony established beyond any possibility of a doubt that Jeremiah Delhagen died as a result of the multiple blows administered by petitioner and his cohorts.

In view of these voluntary admissions made under oath in his own defense, it is difficult to perceive any substance to petitioner's present argument that his conviction was obtained as a result of an allegedly coerced confession.

## POINT V.

**The petitioner was not prejudiced by the Prosecutor's summation; the entire trial, including the Prosecutor's summation was implicit with fundamental fairness.**

The petitioner asserts that the Prosecutor made comment during his summation upon facts not in evidence, thereby precluding the petitioner from a fair trial.

Petitioner argues in his brief (pp. 92-93) that the Prosecutor improperly referred to one John Dean. In order to evaluate the worth of this argument and to demonstrate its futility, it is appropriate to examine those portions of the record in which John Dean is mentioned.

Mention of John Dean was made by counsel for the petitioner in his opening statement to the jury in the following manner (R27a):

> " * * * we are going to show you, and I think we are going to be on all fours, both sides, that but for the intervention of this man (John Dean) these boys would not be on trial here today and the Court would not be here and you folks at this Christmastide wouldn't be tied up doing your duty under oath on behalf of the State and on behalf of these boys."

From the apparent content of counsel's opening statement, it would appear that the defense would present positive proof that the defendants were driven to crime or directed in their efforts by this person, John Dean. Was this promise fulfilled? No, not one shred of evidence was presented, or offered, to prove or even intimate the truth of this promise.

However, petitioner's counsel was not content to abandon his promise by failing to present any proof to support it, but on summation he spoke of John Dean in the following manner (R857a-10 to R858a-33):

> " • • • in our investigation we came across certain factors which we indicated to you in our opening, factors that we of the defense did not have anything to do with, factors that we found as a result of investigation, factors that had been known to the prosecution for a long time before, and amongst those factors we came across Dino, and my friend is going to tell you about Svengali and he is going to tell you about this mature person, and I challenge my friend to explain to you, to knock out from your considerations the questions which I put to you about Dino, or whatever his name is, these facts, because if it wasn't for Dino, the mature person, not one of these boys would be here today. Wherever he sits, if he is in the courtroom, I hope he looks at these baby blue eyes of Bobby Berry, because they are the only thing similar to a cherub's eyes that you will ever see, and then at the boy Gene, enmeshed, engulfed in this abyss which he finds himself in, not knowing what is going on, and sees these sorrowful eyes of Vaszorich, until his dying days. I hope he carries a recollection of this because but for him, because of the filthy lucre which he has in his pocket today, if he did not actually divide, but for him not one of these boys would have been here today.
>
> You are going to take those pants of Brown's that are in evidence, that my friend told you had blood on them. I want you mothers and fathers to consider, if your boy was out until three or four o'clock in the morning and came home, would you sometime in the course of a month look at his pants and see what was on them? Don't you suppose that that Svengali, murderer, crook, whatever he is, knew in

> that month's time that that boy's pants had blood on them? Why didn't he go to the police, as any other decent right-thinking man would, and say, 'Gentlemen of the law, there is something wrong. This boy that I have taken in for some 15 months has got what looks to me like blood on his pants. Find out what it is, will you? He was out until 4 o'clock on the night of the Delhagen killing. I don't know that he is connected with it. Find out. And, gentlemen of the law, I must tell you this too. I must state to you that shortly after the Delhagen incident he gave me a hundred dollars in payment of an automobile and, gentlemen, I am raising that question for your consideration and investigation, because at that time my boy wasn't working? My boy wasn't working.'
>
> Where in God's name can you justify that conduct when but for the intervention of Dino Brown would never have known where Delhagen was, and certainly Berry and Vaszorich wouldn't have been there."

The caliber of argument was grossly unfair. Counsel's opening promise proved to be unfounded, and his summation continued this speculation in full reliance upon *matters not in evidence,* i. e., the details of his asserted investigation.

The Prosecutor was fully justified, if not duty bound, to make fair comment upon these matters argued by the defense. This was done in the following manner (R874a):

> "My good friend speaks and spoke for the past, for the past two weeks at least, of Svengali. John Dean sat in this courtroom—I think his name is John Dean—sat in this courtroom during every day of the two weeks that you ladies and gentlemen were selected; and John Dean sat in this courtroom dur-

ing this entire trial. He is this Svengali. He is the Svengali, and John Dean may be in this courtroom this morning; I don't know; but I offered a special session of the grand jury to counsel if they had one iota of evidence to present against John Dean to show any connection with this case.

John Dean means nothing to the state. If he is implicated, then he should go. If he is implicated he is guilty; but we questioned John Dean. We took a statement from him. I showed the statement to all three members of the counsel before this case ever started. They read that statement."

It is submitted by the respondent that in view of the unfulfilled opening promise by Vaszorich, coupled with his summation grounded in conjecture and speculation, the summation of the Prosecutor was morally right, logically reasonable, and justified by the record.

The following are New Jersey cases in which it was held that remarks of the Prosecutor were not prejudicial, but well within the evidence and reasonable inferences therefrom.

In *State* v. *Cioffe,* 128 N. J. L. 342, aff'd 130 N. J. L. 160 (E. & A., 1943), defendants were referred to as "scourges coming into the country;" "users of guns"; and "sources of seeds which must be removed."

In *State* v. *Barker,* 68 N. J. L. 19 (Sup. Ct., 1902), the prosecutor said that "a verdict of acquittal would be a miscarriage of justice."

In *State* v. *Lang,* 75 N. J. L. 1 (Sup. Ct., 1907), defendant was referred to as a "monster in his passions, licentious in his desires, beastly in his love, brutal when thwarted and cowardly when caught."

In *State* v. *Tansimore*, 3 N. J. 516 (Sup. Ct., 1950), the prosecutor told the jury, "Don't let this man, twice bloody, go twice unbowed." The remarks were held to be morally right, logically reasonable and justified by the record.

It is respectfully submitted that when the remarks complained of are read with the full context of the summation in connection with the evidence in the case, it cannot be said that they were inflammatory or prejudicial. On the other hand, the remarks were logically reasonable and fully justified by the record and the conduct of petitioner's counsel.

Again the respondent directs this Court's attention to the fact that in rendering its opinion the court below did not decide any federal question and petitioner is thereby precluded from urging his present argument. *Whitney* v. *California*, 274 U. S. 357, 360; *Dewey* v. *Des Moines*, 173 U. S. 193, 200. The opinion of the Supreme Court of New Jersey (*State* v. *Vaszorich*, 13 N. J. 99, 118-120; petition pp. 43-44) indicates that the court disposed of the question on the ground that the jury was adequately instructed to ignore any remarks made by counsel, and to guide their deliberations by their own recollections.

## POINT VI.

**The manner in which the jury returned its verdict is solely a matter of the interpretation and enforcement of the laws of the State of New Jersey and no federal question is involved.**

As stated by this Court in *Twining* v. *New Jersey*, 211 U. S. 78, 91:

> "* * * If the right here asserted is not a Federal right, that is the end of the case. We have no au-

thority to go further and determine whether the state court has erred in the interpretation and enforcement of its own laws."

In order to fully appreciate the direct application of this rule of restraint to the petitioner's present argument, the facts are briefly summarized as follows:

Under the provisions of the appropriate New Jersey statute[7] the obligation of the jury in murder cases is to designate by their verdict, if they find the accused guilty, the degree of murder. This statutory direction has been subject to interpretation in various cases in which irregularities have appeared in the announced verdict. *State* v. *Cooper,* 2 N. J. 540 (Sup. Ct., 1949); *State* v. *Cleveland,* 6 N. J. 316 (Sup. Ct., 1951); *State* v. *Greely,* 11 N. J. 485 (Sup. Ct., 1953).

These cases fall into two categories and have been so considered by the New Jersey courts:

(1) Those cases in which the *collective* verdict of the jury, as announced by the foreman, is lacking in the required designation of first or second degree murder. *State* v. *Cooper, supra,* wherein the collective verdict was one of "guilty" with no designation. Such a verdict is fatally defective and cannot be cured by the polling of the jury. *State* v. *Greely, supra.*

(2) Those cases in which the collective verdict properly designates the degree of murder but the polling of the jury shows that the verdict was grounded in ambiguity and misapprehension in the minds of the jurors. *State* v. *Cleveland, supra,* wherein the collective verdict was "guilty of

---

[7] See footnote 4, p. 3.

first degree murder", but a polling of the jury brought responses of merely "guilty". This verdict was held to be defective.

Such being the two classifications, the case of *State* v. *Myers*, 7 N. J. 465 (Sup. Ct., 1951), was next decided by the Court. Speaking through the same Justice that rendered the Court's opinion in the *Cleveland* case, the Court held that a proper collective verdict, assented to by the individual jurors on a polling by a response of "yes", was proper because it displayed agreement with the collective verdict and was not grounded in ambiguity.

The next development in the interpretation of this statutory provision is found in the instant case. *State* v. *Vaszorich*, 13 N. J. 99 (Sup. Ct., 1953). Here there is a situation in which the collective verdict was in accordance with the required statutory designation, but a variation of responses in the polling of the jury. The collective verdict was "guilty of first degree murder, with no recommendation" (R915a-16). Upon a polling of the jury each juror, with the exception of jurors 4, 7 and 11 reiterated the collective verdict. In disposing of this question, and distinguishing *State* v. *Cleveland, supra,* the Supreme Court of New Jersey said (*State* v. *Vaszorich,* 13 N. J. 99, 126-127; petition pp. 52-54):

> "The fact of individual *concurrence* is the objective. * * * otherwise stated, 'to ascertain from each juror whether his individual conclusion was correctly expressed by the verdict which the foreman rendered' * * *
>
> "The required assent of each juror to the correct verdict rendered by the foreman need not be in formal or literal style, provided only that it be unmistakable in meaning. * * *

"We do not think that the jurors' answers under attack here violated this important safeguard. * * *"

The foregoing factual recitals and case citations have been made in order to demonstrate the clearly apparent fact that no federal question is involved or decided in the determination of this question by the Supreme Court of New Jersey. The Court was dealing exclusively in an interpretation and enforcement of the local law of New Jersey.

## Conclusion.

**It is respectfully submitted that for the reasons set forth herein and upon the authority of the citations in support thereof, that the writ of certiorari be denied.**

Respectfully submitted,

J. Victor Carton,
Monmouth County Prosecutor,
State of New Jersey,

George A. Gray,
Assistant Prosecutor of Monmouth County,
State of New Jersey,
Monmouth County Court House,
Freehold, New Jersey

J. Frank Weigand,
36 West Front Street,
Keyport, New Jersey,
Counsel for Respondent.